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No. 89-1322

In The  
**Supreme Court of the United States**  
October Term, 1989

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OKLAHOMA TAX COMMISSION,

*Petitioner,*

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE  
OF OKLAHOMA,

*Respondent.*

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On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Tenth Circuit

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REPLY BRIEF FOR  
THE OKLAHOMA TAX COMMISSION

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DAVID ALLEN MILEY  
Assistant General Counsel  
*Counsel of Record*

JOE MARK ELKOURI  
OKLAHOMA TAX COMMISSION  
2501 Lincoln Boulevard  
Oklahoma City, OK 73152-3248  
(405) 521-3141

*Attorneys for Petitioner*

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I. THE TRIBE IS RESPONSIBLE FOR TAXES THAT IT  
HAS A DUTY TO COLLECT.

The Tribe asserts in its Brief at page 26 that Indian tribes are not taxable pursuant to *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985). Therefore the Tribe concludes that when it sells cigarettes and other goods at its tribal store to the general public, it cannot be held responsible for uncollected state taxes even though it has

a duty to collect those taxes under *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

This interesting theory puts the Tribe in a very convenient position whereby the Tribe will be irresponsible to pay for taxes it forgets to collect even if this Court rules that *Colville* does apply. So, win or lose, the taxes won't get paid. If the Court finds that *Colville* does not apply, the Tribe wins the case and continues to sell untaxed goods to the citizens of Oklahoma. If the Court finds that *Colville* does apply, the Tribe loses the case but still continues to sell untaxed goods since, as a Tribe, it is precluded from paying taxes.

This is not what the Court decided in the *Blackfeet* decision. In *Blackfeet* the State of Montana imposed a tax on the Blackfeet Tribe's royalty interest in oil and gas leases on the reservation. This Court found that the tax was invalid because the tax immunity of the United States is shared by the Indian tribes for whose benefit the United States holds reservation lands in trust. The *Blackfeet* case is distinguishable from the case at bar because the cigarette taxes at issue here are imposed on the ultimate consumer or users of cigarettes, see 68 O.S. §302, and not on the tribe. Since the legal incidence of the cigarette tax falls on the consumers of cigarettes purchased from the Tribe's store, the State has the right to require the Tribe to collect the tax on behalf of the State, *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985). Under current doctrine, a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may

fall on the United States or tribe, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. \_\_\_, 109 S.Ct. 1698 (1989).

The practical problem that faces the State in this case is enforcement of the State's right to collect its valid taxes. As the Tribe points out in its Brief at page 17, the State can assess the cigarette tax against a wholesaler who is licensed and doing business in Oklahoma, when that in-state wholesaler sells unstamped cigarettes to an Indian Tribe. Under this method the State has effectively prevented all in-state wholesalers from selling to Indian tribes. However, tribes may still obtain unstamped inventories of cigarettes from out-of-state wholesalers who have no apparent nexus with Oklahoma and are therefore not required to stamp the cigarettes. Also, since the cigarettes are shipped across state lines, the wholesalers' home-state does not require the cigarettes to be stamped. By playing the various state laws against each other, the Tribe can obtain an unstamped cigarette inventory, fail to affix the State stamp, and offer a large "tax-exemption" discount to its customers. There is nothing wrong with the Tribe buying cigarettes out of state, but when those cigarettes are sold in Oklahoma, the State looks to the Tribe to stamp the cigarettes or pay the delinquencies, 68 O.S. §305(b).

The Tribe is fully aware of its duty under the decisions of this Court to collect the State cigarette tax, but is also cognitive of its ability to evade those taxes. The Tribe now complains that after years of such tax evasion, it is now faced with an enormous tax liability that would materially affect the Tribe's financial condition if it is required to pay it. But that is only the natural consequence of the Tribe's decided action to evade valid state



taxes in its business operations. Obviously the duty to pay the tax means nothing if the consequence of not paying the tax is getting away with it. It is therefore reasonable to conclude that if the Tribe practices to evade taxes, it will be snared in a web of tax liabilities.

The Tribe responds evasively to this Court's authority in the trilogy of cases, *Moe*, *Colville* and *Chemehuevi*. First, the Tribe presumes to tell this Court which issues it can review and asserts at page 38 of its Brief that any issues relating to the State's counterclaim are not properly before the Court. The Tribe never attempts in its Brief to give any reasons for its position but seems satisfied in concocting diversionary arguments aimed at disposing of the controlling case law in a superficial basis, in an obvious attempt to avoid the problematic task of dealing with this court's decisions in those cases on a factual basis.

Next, at page 41 of its Brief, the Tribe tries to explain the concept of "jurisdiction." In a display of its boundless arrogance toward State or Federal law on the subject, the Tribe proposes to analogize this case to a situation involving Maine seeking to compel Canada to collect Maine taxes on sales in Canada. You don't suppose Canada would stand for that, do you? Such utterly ridiculous reasoning undermines the whole Brief of the Respondent Tribe. In the *Cotton* case, this Court found that the State and Tribe shared jurisdiction on the reservation and therefore Cotton Petroleum Corp. was required to pay both a state and a tribal tax since its activities occurred both within the State of New Mexico and on the tribal reservation. The Tribes' "foreign nation" theory doesn't hold water. *Cotton* held that the Commerce Clause of the

Constitution is divided into three classes: foreign nations, the several states, and Indian tribes. The Constitutional Convention considered each class as entirely distinct, 109 S.Ct. 1716. Therefore Indian tribes are not treated in the same manner as either foreign nations or States. In terms of this case, the Tribe is operating a business within the State of Oklahoma rather than in a zone without jurisdiction.

The Tribe finally makes its citation to Public Law 280 where it draws the conclusion that *Moe*, *Colville* and *Chemehuevi* do not apply to Oklahoma. The Tribe does not explain how those three cases relied entirely on the basis of Public Law 280 without citing the law. Furthermore, the Tribe ignores the cases that are just too hard to explain away such as *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), where this Court held that Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State, and *Cotton*, supra, where the Court found that questions of preemption in the area of state taxation of lessees of Indian land are not resolved by mechanical or absolute conceptions of tribal sovereignty and state tax laws do extend onto the reservation and apply to non-Indians on the reservation. The Tribe has failed to establish any reason or authority as to why it is immune from the decisions of this Court which mandate that the State tax laws apply to its business.

## II. THIS COURT HAS THE POWER TO PREVENT THE UNCONSTITUTIONAL APPLICATION OF THE INDIAN SOVEREIGNTY DOCTRINE.

The State has proposed in its Brief-in-Chief that the sovereign immunity of Indian tribes, upheld in this case

by the Tenth Circuit, should be struck down because of the changing circumstances of today posed between State government administration and the ever expanding scope of tribal governments into the general community of the State which is governed by State law. The immunity doctrine should be abandoned in light of the Tribe's inability or unwillingness to properly limit itself which causes an impermissible burden on the administration of State law in violation of the Tenth Amendment to the Constitution.

The Tribe and the Solicitor General of the United States as *amicus curiae* urge this Court to do nothing; just keep everything the same and whatever you do, don't do anything. Under this plan, the State may have a right but without any ability to sue the Tribe, no power of enforcement which will leave the Tribe in a position to choose not to comply with any law, State or Federal, and be free from any adverse consequences, leaving the State to muddle through or just drop the issue altogether.

This, of course, would allow the Tribe to expand its business operations as it sees fit and leave the State powerless to collect its valid taxes. Of course, the Tribe states that it can think of a lot of ways it will spend its future profits and the Solicitor General is equally unconcerned that State taxes won't get paid since he is a federal employee who receives a federal paycheck and it does not appear that any federal tax revenue is in danger. Besides, the Solicitor is not the tax collecting agent for the State of Oklahoma and any difficulties the State may be experiencing in collecting tax is not his concern.

So it is not surprising that neither the Tribe nor the Solicitor General want to find any solution to this problem. Therefore neither Brief submitted by the Tribe or the Solicitor come up with answers, only excuses why not. The State merely suggests that this case deserves a solution.

The Tribe asserts the longstanding policies of tribal immunity and cites substantial authority of this Court for its position. But the whole point of the State's Brief-in-Chief is that there are equally substantial reasons for this Court to strike down that immunity in this case which the Tribe does not respond to. However, the State points out that this case only regards the sovereign immunity of the Tribe as it relates to the administration of State law. This case does not involve the sovereignty of the Tribe in its own Courts and over its own internal and social relations which would still be maintained. Also, this case does not involve the Tribe's immunity from suit of private individuals or companies who may deal voluntarily with the Tribe with full knowledge of its immunity. This case deals with a state, a sovereign in its own right, and with administration of state law on a tribal business, not a consensual relationship.

But the Solicitor contends in his Brief at page 10 that if Indian tribes were subject to suits without their consent, scarce tribal resources would be exposed to the expense of litigation and adverse money judgments, which could deprive the Tribes of their ability to furnish necessary services to their members. However, the prospect of litigation and adverse judgments are the ordinary and intended consequences of violating State and Federal laws. These consequences can be avoided by paying the



applicable taxes or complying with applicable laws. The Tribe could have avoided this lawsuit but chose not to. The Tribe is just as able as anyone else to realize the consequences of its choices. There is no reason why the State should carry the burden of the Tribe's wrongful act just because this lawsuit is an inconvenience to the Tribe. Furthermore, the possibility that the Tribe might be deprived of its ability to furnish services to its members is lessened by the fact that the Tribe merely dispenses those services as a conduit of federal programs which would exist independently of the Tribe and probably would exist with less bureaucracy without the Tribe.

But the most challenging and able argument proposed by the Solicitor and the Tribe against the State's position is that tribal sovereignty is subject only to the superior and plenary control of Congress, and Congress has failed to act.

It is not likely that Congress will act because Congress is situated similarly to the Solicitor. Congressmen are federal employees, the federal revenue is not in danger, and Congress is not the collection agent for the State's taxes. The State, however, proposes that its remedy lies in this Court regardless of Congressional action because of the function of our tri-partite system of government and an authority higher than that of Congress: The Constitution.

For this analysis we must journey back to the origins of judicial power to the case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). In the *Marbury* case, in the year 1800, Jefferson had won the presidency from Adams. In the last days of his presidency in the early part

of 1801, Adams appointed John Marshall as the new Chief Justice and made an appointment to William Marbury to be Justice of the Peace in the District of Columbia. Although Marbury's commission had been signed and sealed, Adams neglected to deliver it to him before he left office and Jefferson refused thereafter to mend the oversight. Marbury then sued the Secretary of State, Madison, in the Supreme Court, asking the Court to issue a Writ of Mandamus to compel Madison to hand over the commission. Chief Justice Marshall's decision in *Marbury* is very applicable in the case at bar today. The Chief Justice begins by stating the questions to be decided: (1) Has the applicant a right to the commission he demands? (2) If he has a right, and that right has been violated, do the laws of his country afford him a remedy? and (3) If they do afford him a remedy, is it a mandamus issuing from this Court?

In answer to the first question, the Court found that the commission was properly signed by the President vesting the officer with legal rights and to withhold the commission was an act deemed by the Court not warranted by law, but violative of a vested legal right. Likewise, in the case at bar, the State can point to the trilogy of cases *Moe*, *Colville* and *Chemehuevi* which undoubtedly vest the State with the legal right to have its valid taxes collected. But the State finds itself in a position similar to Mr. Marbury in that, although the State has a right to have its taxes collected, the Tribe is wrongfully withholding those taxes just as Madison refused to deliver the commission. The Court proceeded to the next question, if he has a right, and that right has been violated, do the

laws of this country afford him a remedy? The Court then stated:

The government of the United States has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

In finding that the laws of the country did afford Marbury a remedy, the Chief Justice distinguished between a political question and a justiciable question. The Chief Justice explained that the President is invested with certain political powers as to which he is to use his own discretion. Therefore, where the political or confidential agents of the executive act in cases in which the executive possesses a constitutional or legal discretion, their acts are only politically examinable. "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

In the case at bar the Tribe has a specific duty assigned by decisions of this Court to collect the State's taxes. Since the State's rights depend on the performance of that duty, the State must resort to this Court for a remedy. Although Congress has plenary control of Indian tribes under the Commerce Clause, we are not here dealing with the discretionary act of Congress, but rather the illegal act of an Indian tribe. The State accepts the current federal policy of Indian self-determination, but that policy cannot go so far as to impair the State's ability to function effectively in the federal system in violation of

the Tenth Amendment. The legislative policies of Congress are therefore limited by the Tenth Amendment, which policies must reflect and recognize the special and specific position the States occupy in our constitutional system. The State has a right; that right has been violated; the laws of this country do afford a remedy.

*Marbury's* third question was whether he is entitled to the remedy for which he applies. The Court found that this depended on: (1) the nature of the writ and (2) the power of this Court. As to the first part, the Court found that the writ of mandamus was proper, but it was the second part that was most relevant to the outcome of the case.

The Court found that the Constitution organizes the government and assigns the different departments their respective powers. "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing if these limits may, at any time, be passed by those intended to be restrained?" The Court concluded that it was within the power of the Judicial Branch to enforce the legal right of Mr. Marbury because:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

The same result applies to the case at bar. This Court has the power to decide whether the Indian Sovereignty



Doctrine precludes the State's right to collect its taxes. The State is not required to seek Congressional action to allow it to collect a tax. The whole purpose of the Tenth Amendment was to secure to the States that residuum of sovereignty not expressly granted to the Federal Government so that States may exercise the functions essential to separate and independent existence. This Court must decide on the operation of Indian sovereignty and States' rights.

Furthermore, the Doctrine of Sovereign Immunity is a common law principle acquired from our inherited English legal traditions. Since this Doctrine is a product of case law, rather than a political decision or legislative enactment, this Court has the power to amend or abolish it, as it has done so in the past. The Court construed the Doctrine in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 at 171 (1973), where the Court found that the Indian Sovereignty Doctrine with its concomitant jurisdiction limit on the reach of state law, has not remained static during the 141 years since *Worcester v. Georgia*, 6 Pet. 515 (1832) was decided, which set up the Doctrine. "Not surprisingly, the Doctrine has undergone considerable evolution in response to changed circumstances." The Doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See e.g. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). Similarly, notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. Finally, the trend has been away from the idea of inherent Indian sovereignty as a

bar to state jurisdiction and toward reliance on federal pre-emption, see *Mescalero*, supra.

The framers of the Constitution intended for this court to hear cases such as this one. Alexander Hamilton wrote in *The Federalist*, No. 78 (1788):

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two that, which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents . . .

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## CONCLUSION

The original intent of the Framers of the Constitution was to insure that the several States would not be destroyed as a sovereign political entity by a central government that would become insensitive to the particular problems of a State. The Tenth Amendment and the Great Compromise were intended to protect the States from Federal overreaching by limiting the Federal government in such a way that the States could effectively operate to solve their own problems in their own way.

This case involves a decision regarding the essential power of a State; between tax collection and Indian sovereignty. Congress is indisposed to make this decision. The

Constitution properly lays the burden of this decision on this Court.

Respectfully submitted,

DAVID ALLEN MILEY

*Counsel of Record for Petitioner*

JOE MARK ELKOURI

General Counsel

Oklahoma Tax Commission

2501 Lincoln Boulevard

Oklahoma City, OK 73194-0001

*Attorneys for Petitioner*